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No. 96-1321

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

BROWN UNIVERSITY, *ET AL.*, *PETITIONERS,*

v.

AMY COHEN, *ET AL.*, *RESPONDENTS.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of Brown University's May 1991 decision to stop funding two thriving women's intercollegiate athletic teams -- women's gymnastics and volleyball -- when the university already offered "far more individual positions for male athletes than for female athletes." App. 86a, 89a. Brown also announced that it was terminating funding for two men's teams -- golf and water polo. *Id.* The teams would be allowed to continue only if they could raise all of their funds from private sources. App. 207a. The women's teams would have to raise over $62,000 annually to survive; the men's teams had to raise less than $16,000. *Id.* As a result, Brown knew "full well" that the women's teams (unlike the men's teams) would be unable to continue. 232a.

In April 1992, members of the women's gymnastics and volleyball teams filed this class action lawsuit against Brown University, its President, and its Athletic Director (collectively "Brown"), charging that Brown's intercollegiate athletic program discriminates against women in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, App. 252a ("Title IX").[1] The certified class consists of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown." App. 202a-203a. Plaintiffs sought, *inter alia*, both preliminary and final injunctive relief ensuring women equality of opportunity and treatment in Brown's intercollegiate athletic program.

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[1] Title IX provides, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a), App. 252a.

Cohen I. On December 22, 1992, after a three-week hearing, the district court granted plaintiffs' motion for a preliminary injunction. *Cohen v. Brown University*, 809 F. Supp. 978 (D.R.I 1992) (*"Cohen I"*), App. 202a. In its lengthy opinion and order, the district court first explored the history of intercollegiate athletics at Brown University. It noted that Brown had developed and supported men's teams for over 100 years, but had created virtually all of its women's teams between 1971 and 1977, immediately before and after Title IX was enacted. App.206a.

The court then reviewed the applicable law, including both the relevant federal regulations applying Title IX to intercollegiate athletics, 34 C.F.R. §§ 106.41 *et seq.*, App. 259a ("Title IX regulations"), and the federal government's official *Policy Interpretation* of Title IX and the Title IX regulations. 44 Fed. Reg. 71,413 (1979), App. 261a.[2] It focused on plaintiffs' claim that Brown was in violation of section 106.41(c)(1) of the Title IX regulations, which addresses "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." To determine whether Brown was in violation of section 106.41(c)(1), the district court applied the three-part test for compliance with that section set forth in the *Policy Interpretation*, which asks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

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[2] The Title IX regulations and *Policy Interpretation* were originally promulgated by the Department of Health, Education and Welfare pursuant to an explicit grant of authority from Congress. *See* App. 176a. Since that time, responsibility for enforcing Title IX has devolved to the Department of Education (DOE). For convenience, and following the convention in the lower courts, App. 10a n.6, 175a-176a, we refer to DOE as the agency responsible for enforcing Title IX.

> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

App. 282a. An institution that satisfies *any one* of the three questions is in compliance with this component of the Title IX regulations. *Id.*

Reviewing the evidence in detail, the district court concluded that "plaintiffs have shown a likelihood of success with respect to § 106.41(c)(1) based on Brown's likely violation of the three-part test." App 234a. Specifically, the court found Brown in likely violation of Part One of the three-part test because the ratio of men to women in Brown's intercollegiate athletic program (63.4% men to 36.6% women) was not "substantially proportionate" to the ratio of men to women in Brown's student body (51.8% men to 48.2% women). App. 228a. Regarding Part Two, it found that Brown did not have a "continuing practice of program expansion demonstrably responsive to the developing interests and abilities of the [underrepresented] sex" because, among other reasons, "the only women's team added since 1977 was winter track in 1982, a sport that merely involved providing indoor space to the existing women's track team." *Id.* Finally, the district court found Brown in likely violation of Part Three of the test (requiring the school's present program to "fully and effectively accommodate" the interests and abilities of the underrepresented gender) because

of its decision to stop funding women's gymnastics and volleyball -- two successful women's teams for which there were ample interest and ability. App. 229a. As a result of the loss of university funding, each team was "struggling not only to remain active in varsity-level competition at Brown, but also to survive as a team at all." App. 230a.-231a.[3]

After weighing other relevant factors, the district court granted the preliminary injunction. It reinstated the two women's teams and prohibited Brown from reducing the funding or status of any other women's university-funded varsity team pending trial. App. 249a.[4]

Cohen II. On appeal, the First Circuit unanimously affirmed. *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993) (*"Cohen II"*), App. 167a. At the outset, the court rejected Brown's argument that the three-part test violates 20 U.S.C. § 1681(b) because it (supposedly) mandates strict numerical parity between the gender balance of a college's athletic program and the gender balance of its student body.[5] The court found that

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[3] The district court also noted that "some evidence" suggested that other women's teams not funded by Brown "have been, and continue to be, qualified to compete" at the highest varsity level, but said that, "[a]t this preliminary stage, I am not in a position to rule on the varsity capabilities of other teams." App. 230a.

[4] The district court declined to rule on plaintiffs' claim that Brown was also in violation of sections 106.41(c)(2)-(10) of the Title IX regulations, which require equal treatment of athletes. Although the court observed that "plaintiffs have presented some compelling facts on the differences in treatment between men's and women's teams...indicat[ing] substantial inequalities between the sexes in the areas of funding, publicity and recruitment," App. 224a, it deferred ruling on these claimed violations until trial, based upon its view that a violation of §106.41(c)(1) alone would support a finding of liability under Title IX. *Id.* Brown does not contest that view here.

[5] Section 1681(b) provides: "Nothing contained in [20 U.S.C. § 1681(a), *see* footnote 1 *supra,*] "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or

the three-part test is fully consistent with § 1681(b) because it does *not* mandate gender parity; to the contrary, it allows universities to comply with Title IX by satisfying Part Two of the test (continuing program expansion) or Part Three (full and effective accommodation), whether or not they have satisfied Part One (gender parity). App. 174a-175a.

The First Circuit then rejected Brown's contention that the three-part test "countervails the enabling legislation" because it compares men's and women's athletic participation ratios to their ratios in the student body, rather than to their ratios in some hypothetical population of those with sufficient interest and ability to participate in intercollegiate athletics. App. 183a-184a. In regard to the law, the First Circuit held that DOE's *Policy Interpretation* is entitled to "appreciable deference" under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), as a "plausible" reading of Title IX that "draws its essence from the statute." App. 176a, 184a-185a. It then added, "As it happens, Brown's view is also poor policy for, in the long run, a rule such as Brown advances would likely make it more difficult for colleges to ensure that they have complied with Title IX." App. 185a. Instead of the "relatively simple assessment of whether there is unmet need in the underrepresented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team," Brown's argument would require "[s]tudent plaintiffs...as well as universities monitoring self-compliance, ... to assess the level of interest in both the male and female student populations and determine comparatively how completely the university was serving the interests of each sex." App. 186a. The court also

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percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, that this subsection shall not be construed to prevent the consideration...of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." App. 255a.

observed: "Brown's theory invites thorny questions as to the appropriate survey population, whether from the university, typical feeder schools, or the regional community. [It] would do little more than overcomplicate an already complex equation." *Id.*

The First Circuit similarly rejected Brown's argument that the three-part test violates the Fifth Amendment's equal protection clause and/or requires "affirmative action." It noted that Brown's argument rested on the factually unsupported premise that men are inherently more interested than women in sports, and said:

> Brown points to no evidence in the record that men are any more likely to engage in athletics than women, absent socialization and disparate opportunities." In the absence of any proof supporting Brown's claim, and in view of congressional and administrative urging that women, given the opportunity, will naturally participate in athletics in numbers equal to men, we do not find that the regulation . . . offends the Fifth Amendment.[6]

App. 187a. Finally, the court concluded that the regulation would not transgress the Fifth Amendment, "even if we were to assume, for argument's sake, that the regulation creates a gender classification slanted somewhat in favor of women," because it fulfills a permissible purpose of remedying past discrimination against women. App. 187a-188a.

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[6] Brown's petition recites language from this quote out of context and says the First Circuit created an "irrebuttable presumption" that "women, given the opportunity, will naturally participate in athletes in numbers equal to men." Pet. at 2. That simply is not so.

Cohen III. On remand, after a lengthy trial,[7] the district court found Brown in violation of Title IX and its regulations on two independent grounds. *Cohen v. Brown University*, 879 F. Supp. 185 (D.R.I. 1995) ("*Cohen III*"), App. 85a. First, the district court ruled that Brown failed to satisfy all three parts of the three-part test and was, therefore, in violation of § 106.41(c)(1), governing equal opportunities to participate. App. 114a-144a. Second, the district court ruled that the allocation of offerings by gender within the "unusual two-tiered structure" of Brown's intercollegiate athletic program violates the "equal treatment" portions of the Title IX regulations, § 106.41(c)(2)-(10). App. 144a.

Part One. The district court first held that Brown fails Part One of the three-part test (substantial proportionality) because women are provided with only 38% of the opportunities to participate, when their undergraduate enrollment rate is 51%. App. 98a. In so doing, the district court specifically found that the reason for this disparity is that Brown offers "far more individual positions for male athletes than for female athletes" and "predetermines the number of athletic positions available to each gender" through a variety of practices, including "the practice at Brown to rely almost exclusively on recruited athletes to field varsity teams." App. 89a, 119a-121a n.35.

Part Two. The district court next held that Brown fails Part Two of the three-part test (continuing program expansion) because Brown's history of program expansion for women essentially started and ended in the 1970s. App. 140a. With the exception of 1982, when Brown added an indoor track season for women that it already provided for men, Brown ignored

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[7] Evidence from the 1992 preliminary injunction hearing was incorporated as part of the evidence at trial in 1994. Between the two hearings, the district court heard over 40 days of evidence. At the beginning of trial, Brown restored women's volleyball to funded-varsity status and the parties agreed to a partial settlement, resolving some of the plaintiffs' claims about unequal treatment. App. 96a n.17, 98a.

(women's water polo, skiing), rejected (women's fencing), or outright interfered with (women's gymnastics and volleyball) both the developing and established interests and abilities of women to participate in intercollegiate athletics. App. 88a-98a, 140a. Brown took these actions to save money.

Part Three. The district court then held that Brown fails Part Three of the three-part test (full and effective accommodation) because women with the highest caliber of interest and ability in gymnastics, fencing, skiing, and water polo are not being fully and effectively accommodated in Brown's present program. The district court made its findings in the context of the "unique" and "unusual two-tiered structure of Brown's intercollegiate athletic program." App. 88a, 143a. The school fields both university-funded varsity teams, for which Brown "provides the financial resources to sustain the budgets," and donor-funded varsity teams, which must raise their own funds to exist. App. 90a. "A consequence of this two-tiered system is that most donor-funded varsities have found it difficult to maintain a level of competitiveness as high as their ability would otherwise permit." *Id.* "[T]he burden of [donor-funded] status falls more heavily on women's teams...[which] are less able than men's teams to raise necessary funds from private donations." App. 116a n.30. The district court found that two women's teams, gymnastics and water polo, could not compete at all at the varsity level "if denied university-funded status." App. 142a.

Brown's "Qualified Pool" Argument and Evidence. In applying the three-part test, the district court also addressed and rebuffed Brown's argument that a Title VII "qualified pool" analysis should be utilized and that Brown's superior offerings to men are justified because men are simply more interested in participating in intercollegiate athletics than women. App. 123a-131a. As a legal matter, the district court found Brown's analogy to Title VII "qualified applicant pools" inapposite.

"Title VII," it said, "seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender requirements." App. 126a (emphasis in original).

Even more important, for the purposes of this review, the district court also rejected Brown's "qualified pool" argument *based on the evidence introduced at trial* as "meaningless since it is an impossible task to quantify latent and changing interests." App. 127a (footnote omitted). The court relied upon Brown's own expert, Dr. Finis Welch, in concluding that Brown's "evidence" failed to establish an accurate or ascertainable "qualified applicant pool" and did not "account for the extent to which opportunities drive interests." App. 130a.[8] The district court also faulted, on evidentiary grounds, Brown's reliance on data from matriculated students, based upon its finding that Brown predetermines the students on campus by its selection of teams and its recruiting practices. App. 128a. And it dismissed Brown's reliance on data from Brown applicants, based upon its finding that expressions of interest on Brown's admissions application did not "provide a reliable measure of interest that

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[8] Brown's continued reliance on Dr. Welch's testimony, Pet. at 7, is particularly misplaced, since the district court cited Dr. Welch's testimony to *support* its rulings and Dr. Welch's testimony in favor of Brown was completely discredited at trial. For example, Dr. Welch, who had never conducted any similar study in the past, admitted that he drew directly opposite conclusions about men and women's behavior from the same information. He also insisted that his data demonstrated that there are not enough women at Brown to field a women's water polo team, despite his knowledge that such a team has existed for years. (Tr. 11/30/94 at 148-150; 12/1/94 at 64) Plaintiffs' rebuttal expert, Dr. Donald Sabo, an expert in the fields of sports sociology, research methodology, and gender studies, testified that "the methodological flaws in the report are substantive enough that I would not come to any conclusion regarding participation or interest based on the Welch report." (Tr. 12/6/94 at 161)

will be acted upon given the opportunity." App. 129a (footnote omitted).[9]

Alternative Basis for Liability. In addition to finding Brown in violation of the three-part test, the district court found Brown in violation of Title IX on a second, independent ground because of the way in which the "program offerings" at Brown are "allocated by gender within the two-tiered structure":

> [F]ar more male athletes are being supported at the university-funded varsity level than are female athletes, and thus, women receive less benefit from their intercollegiate varsity program as a whole than do men from their intercollegiate varsity program as a whole. This inequity is a consequence of the qualitative differences between the benefits enjoyed by university and donor-funded varsity teams.

App. 144a. As a consequence, it held Brown liable for violating the "equal treatment" components of the Title IX regulations, 34 C.F.R. §§ 106.41(c)(2)-(10). App. 144a-145a.

Remedial Order of August 17, 1995. In July 1995, Brown submitted a proposed compliance plan in which it proposed to reach "substantial proportionality" under Part One of the three-part test by capping the size of men's teams, increasing the size of women's teams, and creating several junior varsity teams for women. App. 157a. The district court rejected Brown's proposal as "fatally flawed" and neither comprehensive nor a good faith effort. App. 157a-161a. It then noted that, in order to meet Part One by eliminating men's teams (the course

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[9] Brown's assertion, Pet. at 1, that the court "refused to consider" its "overwhelming evidence" on relative interests is, therefore, simply false. To the contrary, as the above reflects, the district court specifically considered and rejected Brown's "evidence." Moreover, the First Circuit, in affirming the district court's findings, rejected Brown's "relative interest" argument as "unproven." App. 39a.

Brown proposed to take next), Brown would need to "eradicate approximately 213 men's varsity positions." App. 163a. Declining to take that approach, the district court ordered Brown instead to meet Part Three of the test by "upgrading the positions of approximately 40 women" -- the women participating in gymnastics, fencing, water polo, and skiing. *Id.* That change would have increased the percentage of women among Brown's varsity athletes to 39.1%.

Cohen IV. Brown again appealed to the First Circuit, broadly attacking the three-part test, the district court's application of the three-part test, evidentiary rulings, and the trial court's rejection of Brown's proposed plan for compliance.[10] After the full court denied Brown's request that the appeal be heard en banc, a new panel of the First Circuit heard the appeal, and, with one judge dissenting, affirmed the district court's judgment on liability and rejection of Brown's proposed compliance plan, but reversed the district court's order of relief, remanding to give Brown another opportunity to present its own proposal for compliance. *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996) ("*Cohen IV*"), App. 1a.[11]

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[10] Brown did not, however, substantively challenge the district court's alternative basis for liability, violation of the "equal treatment" components of the athletics regulations, §106.41(c)(2)-(10). On appeal, plaintiffs argued that argument had been waived and that the judgment should be affirmed, without further examination, on this independent ground. The First Circuit did not address the issue in its decision.

[11] In January 1996, while the appeal was pending, DOE responded "to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics" by issuing a "Clarification" of the three-part test, explaining how the test would be applied in a variety of circumstances. App. 294a. Contrary to Brown's assertion that DOE "changed course," Pet. at 5, DOE expressly rejected suggestions that it alter the three-part test. DOE's Office for Civil Rights ("OCR") explained: "[I]t would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy

The First Circuit found "no error in the district court's factual findings or in its interpretation and application of the law." App. 4a. Contrary to Brown's fundamental premise here -- that the record below demonstrates that men substantially outnumber women among prospective and current students interested in varsity athletic participation, Pet. at 7 -- the majority rejected Brown's contention as "unproven," App. 39a, and affirmed the district court's finding, as a factual matter, that Brown failed to prove that the "full and effective accommodation of the interests and abilities of Brown's female students would disadvantage Brown's male students." App. 8a.

The First Circuit revisited the legislative and regulatory history of Title IX, as well as precedent cited by Brown, and concluded that there was no reason to depart from the First Circuit's authoritative interpretation in *Cohen II*, which had since been followed by every circuit court to address the issue. App. 26a (citations omitted). Like the district court before it, the First Circuit rejected Brown's claim that the three-part test turns Title IX into an "affirmative action" statute mandating quotas in favor of women. It said: "[N]otwithstanding Brown's persistent invocation of the inflammatory terms 'affirmative action,' 'preference,' and 'quota,' this is not an affirmative action case." App. 20a. "No aspect of the Title IX regime at issue in this case -- inclusive of the statute, the relevant regulation, and the pertinent agency documents -- mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals." App. 22a. The First Circuit also rejected Brown's characterization of the three-part test as creating an "irrebuttable presumption" that absence of statistical parity violates Title IX, saying that "the question of substantial proportionality" in the three-part test "is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement." App. 23a.

Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics." App. 295a.

Although questioning the applicability of § 1681(b) at all to the inquiry, App. 31a, the First Circuit again confirmed, following *Cohen II*, that the three-part test, both on its face and as applied by the district court, is fully consistent with § 1681(b) because the three-part test does not require statistical balancing. App. 32a-33a. The court also again rejected Brown's reliance upon Title VII "qualified pool" analysis. "[T]he Title VII concept of the 'qualified pool' has no place in a Title IX analysis of equal opportunities for male and female athletes," it said, "because women are not 'qualified' to compete for positions on men's teams, and vice-versa." App. 37a.[12] In addition, the First Circuit again rebuffed Brown's "relative interests" approach as both contrary to the remedial purposes of the statute and devoid of evidentiary support. App. 39a, 42a. It said: "We emphasize that, on the facts of this case, Brown's lack-of-interest arguments are of no consequence." App. 42a-43a. Finally, the First Circuit rejected Brown's equal protection argument, concluding that both the statutory scheme and the district court's remedial order satisfied the intermediate level of scrutiny accorded to gender-based classifications, "even assuming that the three-part test creates a gender classification that favors women." App. 52a.[13]

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[12] The court explained: "Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways . . .. [I]n the athletics context, gender is not an irrelevant characteristic. Courts and institutions must have some way of determining whether an institution complies with the mandate of Title IX and its supporting regulations to provide equal athletics opportunities for both genders, despite the fact that the institution maintains single-sex teams, and some way of fashioning a remedy upon a determination that the institution does not equally and effectively accommodate the interests and abilities of both genders." App. 37a-38a.

[13] In view of its rejection of Brown's equal protection challenge, the First Circuit reserved, without deciding, plaintiffs' arguments that Brown had waived the constitutional issue by failing to present it to the district court and that Brown lacks standing to assert the claimed interests of its male students. App. 45a n.17.

REASONS FOR DENYING THE WRIT

I. BROWN IS SEEKING AN ADVISORY OPINION.

For more than 200 years, this Court has held that it "is without power to give advisory opinions." *E.g., Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792)); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). In this case, Brown is seeking such an opinion -- both because the Questions Presented are not raised in this case and because the district court held Brown liable on two independent grounds, only one of which Brown appealed.

A. Neither the Decision Below nor the Record Raises the Questions Presented in the Petition.

All three of the Questions Presented in the petition suffer from the same defect: they contain factual predicates that do not exist in this case. The first Question Presented asks whether liability can be found under certain circumstances against "a university that seeks to offer varsity teams that will accommodate the athletic interests of qualified men and women equally effectively." Pet. at (i). No such university is present in this case. In other words, Brown's assertions in the petition -- that Brown "attempted to design its sports selection in a way that could give men and women an equal chance to participate in athletics" and does not "seek to engineer the gender composition of its program," Pet. at 6 -- are simply false. The district court specifically found that Brown offers "far more individual positions for male athletes than for female athletes," purposefully recruits men and women to fill those positions without regard to others' interests and abilities, and thereby "predetermine[s] the gender balance of its athletic program." App. 89a, 119a-121a n.35. Moreover, Brown is now seeking to *eliminate* teams of qualified women athletes.

The second Question Presented asks whether 20 U.S.C. § 1681(b) prohibits the adoption of "standards governing liability that effectively require universities . . . to make the gender ratio of the varsity athletic program conform to the gender ratio of the student body." Pet at (i). But no such standards are present here. To the contrary, the First Circuit made it abundantly clear that Brown's program would have complied with Title IX if it satisfied *either* the second part of the three-part test (continuing expansion responsive to women's developing interests and abilities) *or* the third part of that test (full and effective accommodation of women's interests and abilities) -- regardless of whether Brown had achieved "gender parity between its student body and its athletic lineup." Pet at 2. It even noted that Brown was "distorting the three-part test by reducing it to . . . a one-part test for strict liability." App. 33a. Moreover, the district court specifically found that Brown could comply with the third part of the test (full and effective accommodation) just by "upgrading the positions of approximately 40 women." App. 142a-43a, 163a. If Brown had taken that course of action, it would now be in compliance with Title IX even though only 39.1% of its athletes would be women.[14]

Finally, the third Question Presented asks whether an interpretation of Title IX that "effectively requires universities . . . to grant preferential treatment to women in order to redress real or perceived societal discrimination" would raise serious questions under the equal protection clause. Pet at (i). No such interpretation is present in this case. The three-part test is, by its terms, gender-neutral. It applies as forcefully to men at Vassar as to women at Brown. Moreover, it does not require

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[14] Despite these facts, Brown asserts in its petition that the First Circuit held it liable "because its athletic program did not produce gender parity between its student body and its athletic lineup" and that "the only feasible way that Brown could have complied with Title IX, as interpreted by the First Circuit, would have been to adopt a gender conscious program, based on a numerical quota, to set aside up to 51% of its varsity athletes." Pet. at 2. Those assertions are false.

universities to grant "preferential treatment" to anyone in order to redress "societal discrimination." Rather, it requires universities to "effectively accommodate the interests and abilities of members of both sexes," 34 C.F.R. § 106.41(c)(1), and redresses "a duly adjudicated determination that specific defendants had discriminated against a certified class of women in violation of a federal anti-discrimination statute; based on findings of fact that were subject to the Rules of Evidence." App. 25a.

Because the factual predicates for the Questions Presented are not present in this case, any ruling on them would constitute an advisory opinion. Moreover, no other questions can properly be raised at this time. *See* S. Ct. Rule 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *United States v. Williams*, 504 U.S. 36, 40-45 (1992); *see also* Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE 348 (7th ed. 1993) ("normally the Court will not consider points or questions not raised below *and* in the petition") (emphasis in original). For this reason alone, the petition should be denied.

B. The District Court Found Brown in Violation of Title IX on Two Independent Grounds, Only One of Which Brown Appealed.

The second reason why any decision in this case would constitute an advisory opinion is that Brown was held liable below on two independent grounds, only one of which Brown appealed. In *United States v. Hastings*, 296 U.S. 188, 193-94 (1935), this Court held that it should not review a federal district court's decision based on two independent grounds, one of which had not been presented for review, saying: "If the judgment is independently based, and in that respect is not open to correction or reversal, we are of the opinion that this Court should not entertain the . . . appeal."

The same principle applies in this case. Here, the district court found Brown liable under Title IX on two independent grounds: (1) failure to provide equal opportunity to participate and (2) failure to provide equal treatment. App. 144a. Brown did not appeal the district court's second, independent ground for finding it liable. As a result, Brown waived any possible challenge to this holding.[15]

The First Circuit did not separately address the district court's independent, alternative ground for holding Brown liable. Nor does Brown challenge the district court's independent basis for liability here.[16] That being so, in this case, as in *Hastings*, any opinion by this Court on the issues raised in the petition would be advisory. Whatever views the Court might express on those issues, the judgment of the district court would remain in effect. Accordingly, the rule articulated in *Hastings* applies here: because the ruling below is "independently based" on a ground that has not been appealed "and in that respect is not open to correction or reversal," this Court "should not entertain the appeal."

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[15] In Brown's opening brief to the First Circuit, the sole reference to this holding was a throw-away line, contained in a laundry list of errors on page 64 of Brown's 65-page brief. This was plainly insufficient in light of the First Circuit settled appellate rule that "issues adverted to in a perfunctory manner, unaccompanied by some developed argumentation, are deemed waived." *Cohen II*, App. 192a (quoting *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990)). Moreover, Brown's attempt to revive the issue in its reply brief was unavailing. "It is well settled in this court, for good reason which need not be rehearsed here, that a legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed. [Such an argument] is waived on appeal." *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 354 (1st Cir. 1992).

[16] None of the Questions Presented addresses the district court's independent basis for finding Brown liable. Pet. at (i). The petition does, however, mischaracterize the district court's holding in a footnote and incorrectly states that "this finding is also based on Brown's failure to meet the quota that is at the heart of this case." Pet. at 12 n.8.

II. AS BROWN ADMITS, THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE FIRST CIRCUIT'S INTERPRETATION OF TITLE IX.

Review should also be denied because the nation's appellate courts uniformly agree with the First Circuit's interpretation of Title IX. Since the First Circuit issued its decision in *Cohen II*, App. 167a, every circuit court of appeals to address the issue has endorsed the analysis of Title IX applied in this case. *See Horner* v. *Kentucky High Sch. Athletics Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley* v. *Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Favia* v. *Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). Thus, the Third, Sixth, Seventh, and Tenth Circuits are in agreement with the First Circuit's interpretation of the law and relevant agency documents. *No* court of appeals has disagreed with the First Circuit's watershed analysis.

The unanimity among the circuits is not surprising, since the courts' approach is based directly on DOE's three-part test for compliance with Title IX. In *Cohen II*, which was the first court of appeals decision applying Title IX to intercollegiate athletics, the First Circuit held that the three-part test was entitled to substantial deference as the authoritative interpretation of the enforcement agency's regulations promulgated in response to express congressional delegation. App. 176a. Every other court of appeals to consider the issue since *Cohen II* has agreed that the Department's test should be accorded substantial deference. Then, in *Cohen IV*, the First Circuit revisited the question of whether the three-part test is entitled to deference, and concluded -- once again -- that the agency's interpretation of Title IX "deserves controlling weight." App. 27a-28a. In an *amicus* brief filed in *Cohen IV*, the United States confirmed that the First Circuit's interpretation of the three-part test is correct, and that Brown should be held liable for its failure to comply with Title IX. Thus, not only are all the circuit courts of appeals

in agreement on the issues presented in this case, but the approach they have followed was dictated by the federal agency authorized to interpret and implement Title IX. It is hard to imagine a case where review is *less* warranted than the circumstances presented here.

Ironically, and implicitly acknowledging the force and persuasiveness of the First Circuit's decisions, Brown goes so far as to *argue* (as if it were a point in favor of Supreme Court review) that the Court should not wait until there is a conflict among the circuits because "there is essentially no prospect" that another circuit will depart from this uniform precedent. Pet. at 29. *See also id.* at 17 (conceding "the uniform position of the circuits and the federal agency responsible for enforcement" of Title IX). This, however, is a reason for *denying* the petition -- not for granting it.

III. CONTRARY TO BROWN'S CLAIM, THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THIS COURT'S PRECEDENTS.

In an effort to conjure up a basis for Supreme Court review in the face of appellate unanimity on the meaning of Title IX, Brown claims that the decision below conflicts with various precedents of this Court regarding Title VII and equal protection. These arguments are without merit.

A. The Decision Below Does Not Conflict With This Court's Decisions Regarding the Proper Approach to Proving Discrimination in Title VII Cases.

Brown's main argument is that the First Circuit "committed virtually every error that this Court has warned against when interpreting the same statutory wording at issue here in the context of Title VII." Pet. at 16. On this point, Brown first claims that the lower court's approach conflicts with this Court's Title VII precedents -- including, in particular, *Wards Cove v. Atonio*, 490 U.S. 642 (1989) -- by "allow[ing] an inference of

discrimination based on a statistical comparison with the student body, instead of the qualified pool of athletes seeking to play varsity sports." Pet. at 16. In Brown's view, the statistical disparity between female athletic participation and female student enrollment at Brown "was the product of differences in men's and women's relative interest in sports, for which Brown has no legal responsibility." *Id.* The proper approach, says Brown, is to compare the *interested* potential varsity athlete pool, however defined, to the make-up of Brown's athletic program, rather than to compare student enrollment and the athletic program. Any other approach, claims Brown, flies in the face of this Court's teachings under Title VII.

This argument manufactures a conflict where none exists. First, as the lower courts found, Title VII's approach to proving discrimination in employment, where men and women compete for the same jobs, makes no sense in the context of intercollegiate athletics, where schools are permitted to create sex-segregated sports programs. Under Title VII, the relevant statistical comparison for proving discrimination is between the percentage of women or minorities in the employer's labor force and the percentage of that same group in the qualified labor market, *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), or, where reliable employment statistics do not exist, the composition of "otherwise-qualified applicants" for at-issue jobs. *Wards Cove*, 490 U.S. at 651. In such cases, statistics are used to show that the denial of jobs or employment benefits to women or minorities is not random, but rather is the result of purposeful discrimination.

The role of statistics in proving denial of equal athletic opportunity under Title IX, on the other hand, is entirely different. In an intercollegiate athletics program that operates separate teams for men and women, the percentage of women participating in athletics is never the result of chance; rather, it is the deliberate result of the number and size of women's and men's teams that the university chooses to sponsor. Accordingly, the purpose of statistical proof in a Title IX

athletics case charging discrimination against women is not to rule out the possibility that the disparity between the percentage of women athletes and women students is random; we already know that it is not. Rather, the purpose is to show that an institution's female students have disproportionately fewer opportunities to participate in athletics than male students at the same institution. Under Title IX's three-part test, such a disparity is unlawful unless the institution demonstrates a history of continuing program expansion in women's athletics (Part Two) or that the interests and abilities of its female students are already fully and effectively accommodated by the present program (Part Three). Thus, Brown's claim that the lower court's approach -- which compared female athletic participation to female student enrollment at Brown -- conflicts with cases under Title VII is meritless; the two statutes are simply not comparable on this point.

Second, as a factual matter, Title VII's "qualified pool" approach is inapplicable in the Title IX context because, as Brown discovered, it is virtually impossible to identify any workable "pool" from which the relevant statistical comparison could be drawn. During the trial, for example, Brown argued that the "qualified applicant pool" for Title IX purposes could be defined in a variety of ways, including matriculated students, all actual Brown applicants, or all academically able potential varsity participants. *See* App. 126a-130a. The district court found, however, that "[e]ach of the possible 'pools' from which Brown might draw varsity athletes has inherent theoretical and practical problems as a survey population." App. 128a. Thus, for example, Brown's attempt to use the group of matriculated students as the relevant pool was rejected for the simple reason that "[w]hat students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches." *Id.* The district court went on to reject Brown's other proposed "pools" as unduly restrictive of developing interests and/or unduly influenced by Brown's offerings and selection practices. App. 126a-130a. Thus, unlike the Title VII context, where the relevant "pool" consists of the

qualified labor market, no comparable measure exists with respect to interested student athletes. Brown's attempt to equate the two statutes and thereby manufacture a conflict warranting this Court's review is groundless and should be rejected.

B. The Decision Below Does Not Conflict With This Court's Decisions Interpreting Title VII to Prohibit Quotas.

Brown's second argument is that the First Circuit's "conclusion that [Title IX] obligates universities to afford preferential treatment to women conflicts with the Court's interpretation of the same language in Title VII." Pet. at 20 (capitalization omitted). On this point, Brown begins by quoting section 1681(b) of Title IX, which essentially provides that Title IX should not be interpreted to "require any educational institution to grant preferential or disparate treatment to the members of one sex on account of" a statistical disparity. *See* footnote 5, *supra*. Brown next states that section 1681(b) was "patterned after Section 703(j) of Title VII" (Pet. at 21 n.15), which, in turn, has been interpreted by this Court as prohibiting the adoption of evidentiary standards that require defendants to institute quotas. Brown then opines that the First Circuit's decision is tantamount to a quota in favor of women, since Brown is being "compell[ed] . . . to reserve up to 51% of its athletic opportunities for some 40% of the pool of qualified athletes." Pet. at 21. Such a "quota," Brown proclaims, is in direct conflict with this Court's Title VII jurisprudence -- *ergo*, review is warranted.[17]

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[17] As a threshold matter, we note that Section 1681(b) is not applicable here. As the First Circuit found, the legislative history preceding the adoption of that provision makes clear that it was "specifically designed to prohibit quotas in university admissions and hiring . . . and does not refer to an imbalance *within the university*, with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body." *Cohen IV*, App. 31a. For purposes of the following discussion, however, we assume *arguendo* that Section 1681(b) is applicable to intercollegiate athletics.

The most basic problem with this argument is that it has nothing to do with the facts of this case. As explained above, there is nothing in the First Circuit's decision -- or, for that matter, DOE's three-part test -- that "compels" or "requires" Brown to reserve 51% of its athletic opportunities for women. To the contrary, while substantial proportionality is a "safe harbor" under Part One, Brown could also have satisfied Title IX by showing *either* a "continuing practice of program expansion" for women athletes (Part Two) *or* that the university was "fully and effectively accommodating" the needs of interested and able female athletes (Part Three). Proof on either point would have absolved Brown of liability under Title IX without regard to the percentage of women actually competing in its athletic program. *See* App. 32a ("the three-part test is, on its face, entirely consistent with § 1681(b) because the test does not *require* preferential or disparate treatment for either gender. Neither the Policy Interpretation's three-part test, nor the district court's interpretation of it, *mandates* statistical balancing; '[r]ather, the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance.'") (emphasis in original) (quoting *Kelley*, 35 F.3d at 271). Thus, Brown's claim that the First Circuit's decision "compelled" it to achieve statistical parity under Part One of the three-part test is sophistry. For this reason alone, none of the Title VII cases cited by Brown on the quota point is relevant here -- and the conflict claimed by Brown is a figment of its own imagination.[18]

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[18] Brown also argues that, even if the three-part test does not *require* statistical parity, it still conflicts with this Court's Title VII jurisprudence because it "encourage[s] the imposition of preferential quotas." Pet. at 21. This argument misstates the law. In reality, this Court has never held that Title VII, as Brown claims, "prohibit[s] the adoption of evidentiary standards that encourage defendants to institute quotas on a voluntary basis." Pet. at 21 (footnote omitted). Thus, for example, in *Wards Cove*, this Court did not outlaw evidentiary standards that would encourage quotas; rather, it merely rejected an approach that would, as a practical matter, have meant that the "*only practicable option* for many employers would be to adopt racial quotas . . ." 490 U.S. at 652 (emphasis added). The same is true in *Watson v. Forth Worth*

Moreover, even if the First Circuit's decision could be construed as requiring an institution to reach statistical parity under Part One (which it cannot), the decision still would not impose a "quota" as that term is used in the Title VII context. The proportionality test of Part One reflects an aspect of intercollegiate athletics that not only is virtually unique among activities covered by Title IX, but also has no parallel in the Title VII employment context: in intercollegiate athletics, sex-segregated programs are the norm. Because intercollegiate athletic programs operate separate teams for men and women, any determination of nondiscrimination must, by definition, compare the participation opportunities provided for men with those provided for women. This does not amount to giving either sex a "quota" or "preference"; it merely provides for the nondiscriminatory allocation of athletic opportunities and resources between the sexes. Moreover, the proportionality test does not favor either men or women. Its analysis, rather, is tied to the availability of opportunities for the "underrepresented sex," which quite plausibly could mean either men or women. Accordingly, unlike the "quotas" disapproved in this Court's Title VII jurisprudence, the Title IX test is properly viewed as a neutral and non-preferential standard.

Finally, even assuming that the First Circuit's decision requires statistical parity and that Brown's analogy to Title VII law makes sense, Part One would only establish an impermissible "preference" in favor of female athletes if, as Brown claims, men are indeed inherently more interested than women in participating in intercollegiate sports. But there is no evidence that this is true. During the six-week trial of this case,

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Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion), where this Court merely held that "legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975)). Thus, Brown's claim that the three-part test contravenes this Court's Title VII cases by "encouraging" preferential treatment is based on a fundamental misunderstanding of the law.

Brown struggled mightily to prove that men are innately more interested in sports than women. The district court ultimately rejected Brown's various attempts to prove this point as factually groundless, holding that "no one measure and no identifiable population adequately establish[es] relative interest . . . ." App. 136a. *See also* App. 127a nn. 43 & 44. The First Circuit affirmed this ruling in *Cohen IV*, rejecting as "unproven" Brown's assertion that the imbalance in the university's sports program "reflects, not discrimination in Brown's intercollegiate athletics program, but a lack of interest on the part of its female students that is unrelated to a lack of opportunities." App. 39a.

At bottom, then, there is no evidence in the record to support Brown's assertion -- repeated as a *mantra* throughout this litigation -- that men are inherently more interested in sports than women. This is not surprising, since Brown's theory is based on the sort of "archaic and overbroad generalizations" about women that this Court has repeatedly struck down as violative of the Equal Protection Clause. *See, e.g., Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975). As the First Circuit found, the type of statistical evidence relied on by Brown "purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports." App. 41a. In any event, absent proof that women are innately less interested in athletics than men, a rule that requires athletic participation opportunities to mirror enrollment rates would not establish a "preference" in favor of *either* sex. For this reason alone, Brown's attempt to claim a conflict with Title VII law must be rejected.

C. The Decision Below Does Not Conflict With This Court's Equal Protection Jurisprudence.

In a final attempt to manufacture a conflict where none exists, Brown claims that the First Circuit's interpretation of Title IX is at odds with this Court's equal protection jurisprudence. Pet. at 24 (capitalization omitted). This argument is wrong as a matter of fact and law.

First, once again, Brown's claim presupposes that the First Circuit has "impos[ed] a mandatory quota" that discriminates against men. Pet. at 25. As explained above, however, the three-part test does not impose a quota of any sort; rather, the test is a straightforward nondiscrimination mandate in the unique context of sex-segregated athletic opportunities. In addition, Brown's theory that a quota requiring statistical balancing would discriminate against male athletes rests on its unproven (and unprovable) notion that men are innately more interested in participating in intercollegiate athletics than women. Thus, this argument fails for all the same reasons that Brown's analogy to Title VII law cannot withstand scrutiny: it has nothing to do with the facts of this case.

Even assuming, however, that the three-part test creates a gender classification that favors women, the decision below still would not run afoul of this Court's equal protection decisions. This Court has repeatedly held that a classification based on sex is permissible where it is based on a compensatory purpose and members of the benefitted sex have been historically disadvantaged. In *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982), this Court held that the party seeking to uphold a gender-based classification "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." This burden is met "by showing that the classification serves 'important governmental objectives' and [is] . . . 'substantially related to the achievement of those objectives.'" *Id.* (citations omitted).

Brown claims that the lower court violated *Hogan* by failing to determine whether "Congress had made any findings of past discrimination that would supply an exceedingly persuasive justification" for the imposition of a quota that discriminates against men. Pet. at 25 (quoting *Hogan*, 458 U.S. at 728). Not only is this statement based on a gross mischaracterization of the facts (*i.e.*, that Title IX creates a "quota"), but it ignores the First Circuit's thorough inquiry into Title IX's legislative history in *Cohen II* – a history that reflects

pervasive discrimination against women in institutions of higher learning and "leaves little doubt that the [statute] was aimed, in part, at creating a more level playing field for female athletes." App. 173a.[19] *Cohen IV*'s ultimate rejection of Brown's equal protection claim rested in part on this prior holding regarding the congressional purposes underlying Title IX. *See* App. 46a. Thus, Brown's claim that the First Circuit failed to conduct an appropriately "searching inquiry" into the goals underlying Title IX is baseless.

Brown also argues that the decision below conflicts with *Hogan*'s admonition that a gender-based classification is unconstitutional unless "members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." 458 U.S. at 729.[20] Here, Brown makes the bizarre claim that the only direct beneficiaries of Title IX are "women who already have the interest, ability, and training necessary to compete in varsity sports at the collegiate level." Pet. at 26. These women, says Brown, "managed to become accomplished athletes despite any societal discrimination"; thus, in Brown's view, a legislative classification that benefits these already-accomplished female athletes violates male athletes' right to equal protection of the law.

Brown's theory makes no sense. First, the claim that female athletes are not burdened by the denial of the *opportunity* to compete, so long as they have been able to *prepare* for

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[19] This comment referred to the legislative history accompanying enactment of the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988), which reinstated institution-wide application of Title IX in response to this Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 574 (1984).

[20] In *Hogan*, the preferential treatment at issue -- the exclusion of men from a state-supported school's nursing program -- was held impermissible because the state had made no showing that women were underrepresented or disproportionately burdened in the field of nursing. *Id.* at 729. In fact, this Court noted that women have traditionally been overrepresented in the nursing profession.

competition, is silly on its face, since the two experiences are unquestionably distinct. More fundamentally, Brown's theory illogically assumes that interest and ability are unrelated to -- and will continue to exist separate and apart from -- participation opportunities. In reality, however, as the "tremendous growth in women's sports since Title IX was enacted" proves, once participation opportunities are provided, women athletes readily step forward to fill them. App. 44a. *Cf.* Costner, K., *Field of Dreams* (Universal Studios 1989) ("[I]f you build it, [they] will come.") Thus, Brown's claim that the decision below conflicts with *Hogan* and its progeny by benefitting a class of women athletes who will continue to thrive with or without Title IX is groundless. There is no basis for granting review on this point.

IV. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS REVIEW BY THIS COURT.

Finally, Brown argues that review is warranted because the decision below will ultimately force universities everywhere to slash men's sports programs. *See* Pet. at 28. This argument again distorts reality; in fact, *none* of the courts of appeals to apply Title IX in the context of intercollegiate athletics has required a school to cut men's sports teams. To the contrary, where a violation of Title IX is found, a school always has the option of simply increasing its women's program -- and leaving the men's athletic program intact. Schools that ignore this route and cut their men's programs instead are really scapegoating Title IX for their own failure to allocate sufficient resources to women's athletics and/or reallocate resources within their men's programs, which take up the lion's share of most universities' athletic budgets. *See, e.g.*, Brake & Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity In Intercollegiate Athletics*, 3 Duke J. of Gender Law and Policy 51, 71-72 (1996). In any event, the question of whether it is a good idea, from a social standpoint, to reallocate resources from men's to women's sports is a policy question neither presented in this case nor deserving of review -- especially in the context

of "the unusual two-tiered structure of Brown's intercollegiate athletic program." App. 88a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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